

SERVICE DATE – LATE RELEASE JUNE 15, 2012

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35622

STEELRIVER INFRASTRUCTURE PARTNERS LP, STEELRIVER INFRASTRUCTURE  
ASSOCIATES LLC, STEELRIVER INFRASTRUCTURE FUND NORTH AMERICA LP,  
AND PATRIOT FUNDING LLC—CONTROL EXEMPTION—  
PATRIOT RAIL CORP., ET AL.

Digest:<sup>1</sup> Sierra Railroad Company and Sierra Northern Railway (collectively, Sierra) ask that the Board reject a notice of exemption that allows for a noncarrier to acquire control of Patriot Rail Corp. Sierra also asks that the Board postpone the effective date of the exemption so that the Board has adequate time to consider Sierra's request. This decision denies Sierra's requests.

Decided: June 15, 2012

By petition filed on June 8, 2012, Sierra Railroad Company and Sierra Northern Railway (collectively, Sierra) request that the Board reject the notice of exemption filed by SteelRiver Infrastructure Partners LP, SteelRiver Infrastructure Associates LLC, SteelRiver Infrastructure Fund North America LP, and Patriot Funding LLC (collectively, SteelRiver). Sierra also requests that the Board stay the effective date of the exemption so that the Board has adequate time to consider Sierra's petition to reject. For the reasons discussed below, the petition to reject will be denied, and the request for a stay will be dismissed as moot.

BACKGROUND

On May 7, 2012, SteelRiver filed a verified notice of exemption under 49 C.F.R. § 1180.2(d)(2) to acquire control of Patriot Rail Corp. (Patriot) and its rail carrier subsidiaries. Notice of the control exemption was served and published in the Federal Register (77 Fed. Reg. 30,589) on May 23, 2012. Though the exemption was scheduled to become effective on June 6, 2012, the Board imposed a housekeeping stay of the effective date of the exemption until June 16, 2012.<sup>2</sup>

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> SteelRiver Infrastructure Partners LP—Control Exemption—Patriot Rail Corp., FD 35622 (STB served May 25, 2012).

Patriot and Sierra Railroad Company are currently involved in litigation before the U.S. District Court for the Eastern District of California in Patriot Rail Corp. v. Sierra Railroad Co., No. 2:09-CV-00009-MCE-EFB (federal court litigation). In that case, Sierra alleges, among other things, that Patriot improperly relied on proprietary financial and operational data received from Sierra to organize the Sacramento Valley Railroad Company, LLC and bid against Sierra for the right to provide service within the McClellan industrial park in McClellan, Cal. Sierra Railroad Company seeks damages, including, in part, lost profits.<sup>3</sup>

Sierra asserts that the exemption procedures are inadequate to allow for the Board to consider what Sierra calls the “highly controversial” issues raised by the proposed transaction. Specifically, Sierra states that the notice should be rejected so that the Board may consider, based on a more fully developed record, the impact of the proposed sale on Sierra’s ability to pursue a remedy in the pending litigation between Patriot and Sierra Railroad Company. Sierra also claims that the Board needs a more fully developed record to consider the potential impact of the sale on the adequacy of rail service provided by Patriot’s subsidiary railroads. Sierra requests that the Board stay the effective date of the exemption so that the Board has adequate time to consider Sierra’s petition to reject. On June 11, 2012, SteelRiver and Patriot filed a joint reply to Sierra’s petition to reject and request for stay. On June 13, 2012, United States Representative John Garamendi filed a letter in support of Sierra’s petition, to which SteelRiver and Patriot jointly replied by letter on June 13, 2012.

## DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. § 11323(a)(4), the Board’s approval and authority is required for a transaction involving the acquisition of control of at least two rail carriers by a noncarrier. Control transactions involving non-connecting railroads are exempt from the prior approval requirements of 49 U.S.C. § 11323, pursuant to the notice-of-exemption process of 49 C.F.R. § 1180.2(d)(2). Section 1180.2(d) provides an expedited means of obtaining Board authority in certain classes of transactions that ordinarily do not require greater regulatory scrutiny. Notices of exemption are intended to be used for routine and non-controversial cases. Notices that contain unresolved issues or questions that require considerable scrutiny may be rejected.<sup>4</sup>

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<sup>3</sup> In the federal court litigation, Sierra sought a temporary restraining order to prohibit the control transaction from going forward. The Board intervened in that proceeding, asserting that the Board has exclusive jurisdiction over the control transaction. The court agreed with the Board and denied the temporary restraining order. Transcript of Proceedings at 16, Patriot Rail Corp. v. Sierra R.R., No. 2:09-CV-00009-MCE-EFB (E.D. Cal. May 31, 2012).

<sup>4</sup> See ABC & D Recycling, Inc.—Lease & Operation Exemption—a Line in Ware, Mass., FD 35397, slip op. at 4 (STB served Jan. 20, 2011) (ABC&D Recycling); see also Ohio Valley R.R.—Acquis. & Operation Exemption—Harwood Props., Inc., FD 34486, slip op. at 4 (STB served Feb. 23, 2005) (“[W]e may reject a notice ... if the transaction engenders substantial controversy.”).

Sierra has failed to demonstrate that there is a need for considerable scrutiny or that there is sufficient controversy in or about SteelRiver's notice of exemption. Sierra makes no allegations concerning the validity of information contained in the notice of exemption but contends that the transaction is controversial because of the alleged impact it may have on Sierra's ability to pursue a remedy in its federal court litigation and on rail service provided by Patriot's rail subsidiaries. Sierra's contentions do not establish the presence of issues that are too controversial for the notice process.

The fact that Patriot and Sierra Railroad Company are involved in litigation does not create a controversy that warrants rejecting this notice,<sup>5</sup> and Sierra's claims that the transaction could somehow affect the remedies available to it in the federal court litigation are not substantiated. The control transaction involves the acquisition of Patriot and its railroad subsidiaries by a noncarrier, SteelRiver, from another noncarrier, Patriot Rail Holdings LLC. As SteelRiver and Patriot note, the operations of Patriot's subsidiaries will not change as a result of the transaction. Nor will the control transaction impede the recovery of any remedy Sierra may seek in litigation, as Patriot will remain a counter-defendant in the federal court case. Thus, as SteelRiver and Patriot note, any judgment against Patriot would be satisfied by Patriot. Contrary to Sierra's contentions, the indemnity provisions in the Stock Purchase Agreement between SteelRiver and Patriot Rail Holdings LLC do not appear to limit any recovery to which Sierra may be entitled as a result of its litigation. Nor is it clear how the control transaction would impede any equitable relief sought by Sierra in the federal litigation.

Equally unpersuasive is Sierra's argument that the notice should be rejected because of the impact the control transaction might have on Patriot's rail service under the ownership of SteelRiver. Sierra argues that SteelRiver's exposure to prolonged litigation and its liability for large damages that may be awarded in the federal court litigation may adversely affect its ability and willingness to continue providing an appropriate level of rail service. Sierra also argues that the control transaction could weaken Sierra's ability to compete as a common carrier due to prolonged litigation. But we find that such highly speculative claims provide no basis for rejecting the notice of exemption. SteelRiver and Patriot note that SteelRiver has conducted in-depth due diligence concerning Patriot and that it is well aware of the federal court litigation. We agree with SteelRiver and Patriot's argument that neither Sierra nor the Board is in a better position than SteelRiver itself to determine the risk to SteelRiver of the control transaction. Nor has there been any showing that replacing one owner with another would put future operations of

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<sup>5</sup> In support of its petition, Sierra cites Winamac Southern Railway—Trackage Rights Exemption—A. & R. Line, Inc., FD 35208 (STB served Jan. 9, 2009), ABC&D Recycling, James Riffin—Acquisition & Operation Exemption—in York County, Pa., FD 34501 (STB served Feb. 23, 2005), and SF&L Railway—Acquisition & Operation Exemption—Toledo, Peoria & Western Railway Between La Harpe & Peoria, Ill., FD 33995 (STB served Jan. 31, 2003). The Board rejected or revoked the notices in these cited cases because of questions and controversy surrounding key components of the transaction at issue. For example, in Winamac, parties disputed the validity of the trackage rights agreement upon which the sought trackage rights exemption would be based. None of these cases involved controversy merely due to pending litigation.

Patriot's rail subsidiaries at risk. Should Sierra be successful in the federal court litigation, there is no reason to believe that SteelRiver would be in a worse position than Patriot Rail Holdings LLC.

We have reviewed the control transaction and find that the transaction meets the standards and requirements for exemption under 49 C.F.R. § 1180.2(d)(2). Because Sierra has not shown that SteelRiver's notice of exemption is defective, misleading, or inadequate and has not otherwise demonstrated a need for regulatory scrutiny, we will deny Sierra's petition to reject.

Because Sierra's argument in support of its stay request is based on its petition to reject, we will dismiss as moot Sierra's request for a stay.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Sierra's petition to reject SteelRiver's notice of exemption is denied.
2. Sierra's request to stay the effective date of the exemption is dismissed as moot.
3. This decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Mulvey, and Commissioner Begeman.